

## MITIGATION BANK ENABLING INSTRUMENT RANCHO JAMUL MITIGATION BANK

This Bank Enabling Instrument (hereinafter "BEI") regarding the establishment, use, operation and maintenance of the Rancho Jamul Mitigation Bank (hereinafter "Bank") is made and entered into by and among Wildlands, Inc. (hereinafter, "Sponsor"), the Los Angeles District of the U.S. Army Corps of Engineers (USACE), Region IX of the U.S. Environmental Protection Agency (USEPA), the Carlsbad Field Office of the U.S. Fish and Wildlife Service (USFWS), and Region V of the State of California, Department of Fish and Game (CDFG), with reference to the following:

### **Section I: Preamble**

A. Purpose: The purpose of this BEI is to establish guidelines and responsibilities for the establishment, use, operation and maintenance of the Bank. The Bank is available to be used for off-site compensatory mitigation for unavoidable impacts to waters of the United States, including wetlands, which result from activities authorized under Section 404 of the Clean Water Act (hereinafter "§404"); impacts to federally-listed threatened or endangered species under Sections 7 and 10a of the Endangered Species Act (hereinafter "§7" and "§10a" respectively) and/or designated critical habitat and/or occupied habitat; impacts to waters of the United States, including wetlands, which result from activities authorized by the National Resource Conservation Service under the Swampbuster provisions of the Food Security Act (hereinafter "FSA"); impacts to State of California-listed threatened or endangered species under the California Endangered Species Act, Fish and Game Code §2050 *et seq.* (hereinafter "CESA"); mitigation for significant impacts to wetland and wildlife resources under the applicable sections of the California Environmental Quality Act, Public Resources Code §21000 *et seq.* (hereinafter "CEQA"); unavoidable impacts to waters of the State of California which result from activities authorized under §1600 *et seq.* of the California Fish and Game Code (hereinafter "§1600"); and the establishment and/or preservation of habitat associated with the Natural Communities Conservation Planning program, Fish and Game Code §2800 *et seq.* (hereinafter "NCCP"); provided the Bank meets all requirements applicable for mitigation with respect to a particular project and that mitigation through use of a bank is authorized by the appropriate authority.

B. Location and Ownership of Parcel: Whereas, Sponsor has been granted the exclusive right to create a mitigation bank on approximately 109 acres of land (Phases I and II) out of a 3700±-acre parcel of land owned by the State of California known as the "Rancho Jamul Property" in San Diego County, California, as shown in the *Rancho Jamul Mitigation Bank Proposal* (hereinafter "Proposal" and also Exhibit B of the BEI) incorporated by reference, and the Sponsor has developed a restoration and enhancement plan to restore and enhance approximately 53.6 acres

of aquatic and riparian habitat and 16.6 acres of non-Corps jurisdictional oak/riparian habitat in Phase I of the project and additional acreage, yet to be determined, in Phase II of the Project.

C. Project Description: Whereas, under this banking instrument, the Sponsor may restore, enhance and/or establish, and then maintain the following types of habitat in accordance with plans shown in the Proposal:

1. Corps Jurisdictional Freshwater Wetlands/Waters of the United States;
2. Corps Jurisdictional Riparian Habitat;
3. Corps Jurisdictional Ephemeral/Intermittent Wetlands/Waters of the United States;
4. Corps Jurisdictional Enhancement Credits (for temporary impacts); and
5. Non-Corps Jurisdictional Oak/Riparian Habitat.

Once the Sponsor has undertaken the habitat establishment, the Sponsor shall then maintain the Bank in such condition until all credits are sold, or until the Bank Closure Plan (Exhibit E) is implemented, whichever is later. The enhanced and restored habitats of the Bank shall consist of a total of approximately 109 acres (approximately 70.2 acres in Phase I and approximately 38.8 acres in Phase II), as described in the table titled *Rancho Jamul Summary of Habitat Restoration Acreages* (Exhibit D) and include the habitats as described in the table and the Proposal.

D. Disclaimer: Whereas, this BEI does not in any manner limit the statutory authorities and responsibilities of the signatory parties.

## **Section II: Stipulations**

A. Baseline Conditions: Whereas, the Bank area is currently as described in the Proposal.

B. Establishment and Use of Credits: Whereas, it is anticipated that, in accordance with provisions (IV)(D-G) of this banking instrument below, credits will be available to be used as off-site mitigation in accordance with all applicable requirements.

C. Composition of the Mitigation Bank Review Team (MBRT): Whereas, the members of the Mitigation Banking Review Team (MBRT) consist of:

U.S. Army Corps of Engineers, Los Angeles District (*USACE*), Co-Chair;  
U.S. Fish and Wildlife Service, Carlsbad Field Office (*USFWS*), Co-Chair;  
California Department of Fish and Game (*CDFG*), Co-Chair; and  
U.S. Environmental Protection Agency, Region IX (*USEPA*).

E. Exhibits: Whereas, the following Exhibits are incorporated as appendices to this BEI:

1. "Exhibit A", Bank location and service areas;
2. "Exhibit B", *Rancho Jamul Mitigation Bank Restoration and Management Plan* ("Proposal"), and all subsequent revisions and addenda thereto, as identified by the Co-Chairs of the MBRT;
3. "Exhibit C", Financial Assurances;
4. "Exhibit D", *Rancho Jamul Summary of Habitat Restoration Acreages*;
5. "Exhibit E", Bank Closure Plan;
6. "Exhibit F", Table of Credits; and
7. "Exhibit G", Land Use Agreement.

### **Section III: Authorities**

#### **A. Federal:**

1. Clean Water Act (33 USC 1251 *et seq.*);
2. National Environmental Policy Act (42 USC 4321 *et seq.*);
3. Endangered Species Act (16 USC 1531 *et seq.*);
4. Fish and Wildlife Coordination Act (16 USC 661 *et seq.*);
5. National Historic Preservation Act (16 USC 470);
6. Swampbuster provisions of the Food Security Act;
7. Executive Order 11990; Protection of Wetlands;
8. Executive Order 11988; Floodplain Management;
9. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR Parts 320-330);
10. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230);
11. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404(b)(1) Guidelines; and
12. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 FR 58605 *et seq.*, hereinafter "Guidelines").

#### **B. State:**

1. California Environmental Quality Act (Pub. Res. Code §§21000 *et seq.*);

2. California Endangered Species Act (Fish & Game Code §§2050 *et seq.*);
3. California Natural Community Conservation Planning Act (Fish & Game Code §§2800 *et seq.*);
4. Streambed Alteration Agreements (Fish & Game Code §§1600 *et seq.*);
5. Sacramento-San Joaquin Valley Mitigation Bank Act of 1993 (Fish & Game Code §1775 *et seq.*); and
6. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly.

**NOW, THEREFORE**, the parties agree to the following:

**Section IV: Establishment of the Bank**

A. Sponsor's Performance Under the BEI: The Sponsor agrees to perform all necessary work, in accordance with the provisions of this BEI, to establish the aquatic and riparian habitats, as proposed in Exhibit B, until it is demonstrated to the satisfaction of the MBRT, acting through the Co-Chairs, that the Bank complies in all respects with all conditions contained herein.

B. Environmental Documentation and Permitting: To the extent not already obtained, the Sponsor will be responsible for obtaining all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank, which consist of the following:

1. Nationwide Permit #\_\_\_\_\_, which was issued to Bank Developer on \_\_\_\_\_, 2000, and which has an effective date of \_\_\_\_\_ (the "NWP #27 Permit"). The NWP #27 Permit does not require the Bank Sponsor to obtain further notification from the Corps that the activities may proceed. Modifications to such activities which fall within the provisions of subsection VI.E and modifications which do not require review by the applicable USACE District Engineer under the Nationwide Permit Program contained in 33 CFR 330.1 *et seq.*, are within the authorization provided by the NWP #27 Permit;
2. CEQA compliance;
3. Section 401 Water Quality Certification or Waiver; and
4. Streambed Alteration Permit or Agreement;

C. Modifications of the Proposal: Establishment of Phase I of the Bank will be performed as described in Exhibit B, and the credits will become available in accordance with the schedule specified in Part V, Section F, of the BEI. Phase II of the Bank must be approved by the MBRT, acting through the Co Chairs, prior to

establishment of that Phase. In the event that the Sponsor determines that modifications must be made in the Proposal to ensure successful establishment of habitat within the Bank, or in order to comply with specific permits or other authorizations needed to establish the Bank, the Sponsor shall submit a written request for such modification to the MBRT, through either of the Co-Chairs. The Sponsor shall then implement all modifications approved by the Co-Chairs, acting in consultation with the other members of the MBRT. Documentation of implemented modifications shall be made consistent with subsection IV(F), *infra*.

D. Financial Assurance Requirements: The Sponsor agrees to provide the following financial assurances over the life of the Bank and at Bank Closure, for the periods noted:

1. Prior to the transfer of any Bank credits, Sponsor shall furnish the USACE with a Performance Bond ("Performance Bond") in the amount of 120% of the cost of construction<sup>1</sup>, issued by a surety authorized to issue bonds in the State of California and identified as an acceptable surety in Treasury Circular 570. The Performance Bond shall assure performance of Sponsor's obligation to construct the aquatic and riparian habitats in accordance with this BEI. The USACE shall release the Performance Bond upon Sponsor's completion of such construction, as evidenced by:

(a) The submission of the as-built drawings, per Section IV(F); and

(b) Verified by a subsequent on-site inspection by the Co-Chairs of the MBRT; or 60 calendar days have passed without either of the Co-Chairs of the MBRT contacting the Sponsor to arrange for such on-site verification inspection.

2. During the period of habitat establishment, and until performance objectives are met, the Sponsor shall also furnish the USACE with Contingency Security.

(a) The amount of the contingency security shall be in an aggregate amount equal to \$5,000 per aquatic or riparian habitat acre credit transferred (collectively, the "Contingency Security"). The Contingency Security shall assure performance of Sponsor's maintenance obligations under this BEI, including, without limitation, its obligation to cure its defaults and deficiencies under this BEI.

(b) Provided the Bank meets the performance objectives specified in the Proposal, as verified by the Co-Chairs through a final compliance visit, the Contingency Security shall be released upon the later of: (i) the fifth anniversary of the date of this BEI; or (ii) the third

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<sup>1</sup> The cost of construction shall be the amount set forth in the construction contract entered into by Sponsor.

anniversary of the final remedial action taken in order to meet the performance objectives set forth in the Proposal.

3. During the period of Bank credit sales, the Sponsor shall make deposits into a nonwasting endowment fund held by the CDFG in order to assure long-term maintenance of the Bank in perpetuity.

(a) Endowment funds shall be deposited with each credit sold in the amount of \$8,400 multiplied by the number of credits transferred.

(b) Funds deposited in the endowment fund shall be held by the CDFG as trustee and expended in accordance with the Declaration of Trust Agreement attached as Exhibit C.

E. Legal Assurance:

Inasmuch as the State of California is the fee title owner to the property upon which the Bank is being developed, it will not be necessary to execute, deliver or record the customary Conservation Easement in favor of CDFG. However, if the land is transferred by the State of California to any landowner other than the State of California, the customary Conservation Easement and/or deed restriction shall be imposed by CDFG in conjunction with the transfer in order to ensure the ongoing management of the Bank for conservation purposes.

F. As-Built Drawings: The Sponsor agrees to submit as-built drawings, with accurate maps of the constructed habitat no later than 90 calendar days following completion of the re-vegetation associated with the establishment of the Bank. The as-built drawings will describe in detail any deviation from that described in the Proposal. The Table of Credits (Exhibit F) shall be revised based upon the as-built drawings.

**Section V: Operation of the Bank**

A. Service Area: The Bank is established to provide mitigation to compensate for unavoidable impacts to Waters of the United States, including wetlands, stream bed habitat and endangered species habitat within the service area of the Bank, as described and shown at Exhibit A. Decisions authorizing use of credits from the Bank will be made by the appropriate authority on a case-by-case basis. In general, it is agreed that use of credits from the Bank will be authorized whenever the appropriate authority determines: (i) that the particular project requiring mitigation may mitigate through bank credits; and (ii) the Bank has available, for sale, mitigation credits of the type required for the particular project.

B. Access to the Bank by the MBRT: The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this banking instrument. Inspecting parties shall provide reasonable notice to the

CDFG and the Sponsor, during normal business hours and of at least 24 hours prior to inspection of the Bank.

C. Projects Eligible to Use the Bank: Each regulatory and/or resource agency will determine the eligibility of projects to use the Bank on a case-by-case basis for mitigation of impacts appropriate to that agency's jurisdictional authority. In general, it is agreed that activities falling within a permit under any one or more of the following authorities will typically be eligible to use the Bank, provided that the wetlands, habitats and species at the impact site are comparable to those for which the Bank has been established (wetlands and species at the Bank are intended to provide "in-kind" mitigation):

1. Section 404 of the United States Clean Water Act;
2. Sections 7 and/or 10(a) of the United States Endangered Species Act;
3. Section 1600 of the California Fish and Game Code;
4. Section 2081 of the California Endangered Species Act; and
5. Mitigation under the provisions of an approved plan which is consistent with the Natural Community Conservation Program (California Fish & Game Code §§2800 *et seq.*).
6. Mitigation identified in the San Diego County Biological Mitigation Ordinance, and/or other local agency plans, rules, regulations and/or ordinances.

D. Assessment Methodology:

1. Credits and debits will be measured as described in Chapter 4 of the Proposal, which is incorporated by reference into this BEI. Credits have been assigned to the Bank based upon the level of projected habitat function minus the level of habitat function existing prior to the Project.
2. For the purposes of this BEI, a "creation/restoration credit" is defined as a measure of habitat function relative to a given unit of areal measurement (i.e., acres), such that one creation/restoration credit is equal to one unit of the given areal measurement at full habitat function.
3. The total number of creation/restoration credits anticipated to be established in Phase I is 45.58. The total number of Phase I enhancement credits is anticipated to be 8.02. This credit total will be adjusted, as necessary, based on the area calculated from the approved as-built drawings.

E. Success Criteria: The success criteria described at Table 4, Chapter 3 of the Proposal incorporated by reference into this BEI, will be used to assess project success.

F. Schedule of Credit Availability: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by the Co-Chairs, in consultation with the other members of the MBRT, it is agreed that credits will become available for use by the Sponsor or for transfer to a third party in accordance with Exhibit F, Table of Credits, attached hereto, as follows:

1. 15% of the total credits shown on Exhibit F, Table of Credits, shall be available upon approval of this BEI.

2. Additional credits shall be available when as-built drawings are furnished:

a. An additional 65% of the total credits within an active Phase of the Bank shall be available upon completion of the habitat construction work (i.e., grading and planting) within that Phase, as shown on the as-built drawings. In that regard:

(i) Phase I may be constructed in separate subphases, and to the extent such construction is subphased, the additional 65% credits shall be measured only with respect to the acreage of the subphase(s) constructed.

(ii) The actual number of credits made available under this subsection V.F(2)(a) will be adjusted such that 80% of the total credits within that Phase or subphase (including those initially made available under subsection V.F(1)), as shown on the as-built drawings for that Phase or subphase, are available.

(iii) Availability of enhancement credits will be based upon the removal of exotic plant species as shown on the as-built drawings. The as-built drawings showing removal of exotic plant species may be combined with the grading and planting as-built drawings, or at Sponsor's election, by separate as-built exotic plant removal drawing(s).

b. The remaining 20% of the total credits within an active Phase (or subphase) of the Bank shall be available upon attainment, within that Phase (or subphase), of the "year 3" success standards for that Phase (or subphase) as set forth in the Proposal. (Note: availability of the credits is based upon attainment of the "year 3" standard, not the timing of such attainment. Attainment may occur either before or after year 3 itself.) The success standards that will govern credit release for enhancement credit release are those that address percent cover by exotic species.

G. Assignment and Use of Enhancement Credits:

1. Enhancement credits have been assigned to Phase I of the Bank based on the exotic species removal and management and on the supplemental planting activities described in the Restoration and Management Plan (8.02 credits). These enhancement credits are only assigned for reaches of the creeks where no adjacent habitat restoration/creation is planned as part of Phase I.



2. Phase II credits may be assigned for restoration and creation, and some may be assigned for further enhancement of wetland habitat.

3. The enhancement credits shall not be used to compensate for permanent impacts.

H. Limitation of Phase II Credits. Enhancement credits will not be provided for the reach of Jamul Creek where enhancement credits have already been allocated. Additionally, if Phase II restoration/creation results in habitat located adjacent to segments of Jamul Creek where enhancement credits have already been assigned, the number of these enhancement credits (associated with the adjacent creek segments) will be deducted from the overall number of credits in the Bank. This deduction will be from available enhancement credits first, followed by deduction from available restoration/creation credits.

I. Provisions for Uses of the Mitigation Bank Area: Sponsor agrees, so long as this Agreement is in effect, that Sponsor shall not:

1. Use or authorize the areas proposed for dedication within the Bank for any purpose which interferes with its use as a mitigation bank, or unreasonably interferes with or compromises the ecological functions of the bank site or for any purpose which is in violation of the Land Use Agreement in effect for the property (Exhibit G).

2. Erect any permanent structures within or upon the areas proposed for dedication within the Bank unless required or permitted by the approved Management Plan.

3. Construct any structures or engage in any development activities on the Property other than those specified in the Proposal. Development activities shall mean only those actions that may change the biological, hydrological or physical characteristics of the land, but specifically do not include entry upon the land for other purposes, such as investigation, measurement, or surveying.

## **Section VI: Maintenance and Monitoring of the Bank**

A. Maintenance Provisions: The Sponsor agrees to perform all work necessary to maintain the Bank consistent with the maintenance criteria established in the Proposal. The Sponsor shall continue with such maintenance activities until closure of the Bank. Upon closure of the Bank, the Sponsor shall implement the management actions described in the Proposal and established in the Bank Closure Plan. The Bank Closure Plan has been designed to ensure that the Bank Site is managed and maintained, in perpetuity, consistent with the conservation purposes of the Project. Deviation from the approved Bank Closure Plan is subject to review and written approval by the Co-Chairs, in consultation with the other members of the MBRT.

B. Monitoring Provisions: The Sponsor agrees to perform all work necessary to monitor the Bank in accordance with the monitoring procedures set

forth in the Proposal in order to demonstrate compliance with the success criteria established in the BEI.

C. Reports: The Sponsor shall submit to the Co-Chairs of the MBRT for distribution to the other members of the MBRT, reports describing the conditions of the Bank and relating those conditions to the success criteria. Reports will be submitted by November 30th of each calendar year, beginning after the first full growing season is complete after revegetation, and shall contain information as described in Chapter 3 of the Proposal.

D. Accounting Procedure: The Sponsor shall submit a copy of the invoice showing to whom the credits were sold, date of the transaction and the related USACE and USFWS action identification numbers to the Co-Chairs of the MBRT each time credits are debited or additional credits are certified. If requested, the USACE will distribute copies of the invoices to the other members of the MBRT. The Sponsor shall submit an annual ledger to the Co-Chairs of the MBRT, for distribution to all members of the MBRT, showing all transactions at the Bank for the previous year.

E. Remediation Plans: In the event the Bank fails to achieve the Success Criteria:

1. The Sponsor shall develop remediation plans and submit them within 30 days to the MBRT. The remediation plans will include proposed remedial actions and a schedule within which the actions will be implemented. The Sponsor shall then implement the necessary and appropriate remedial actions for the Bank in coordination with, and under the schedule approved by, the MBRT. In the event the Sponsor fails to implement such remedial actions within the schedule approved by the MBRT, any one or more of the Co-Chairs will notify the Sponsor and identify remedial actions necessary in order to achieve the performance objectives set forth in the Proposal.

2. If any one or more of the Co-Chairs determine that the Bank is operating at a deficit, the Sponsor shall be given written notification, whereupon debiting of credits will immediately cease, and the Co-Chairs, in consultation with the other members of the MBRT and the Sponsor, will determine what remedial actions are necessary. If, within six months of the written notification, conditions do not change or continue to deteriorate, or the USACE or CDFG are dissatisfied with efforts undertaken by the Sponsor, control of the Contingency Funds and the long-term management funds shall be transferred to the USACE or CDFG, or their designees, as appropriate, to undertake corrective measures.

F. Release of the Contingency Security: At the request of the Sponsor, after a determination by the Co-Chairs, in consultation with the other members of the MBRT, that all success criteria have been satisfied as evidenced by the

requirements of Section IV(D)(2)(b), the Co-Chairs will perform a final compliance visit and the USACE will release the Contingency Security.

G. Long-Term Maintenance: Once the performance objectives in the Proposal have been met, the long-term maintenance and care of the Bank shall be assured pursuant the Bank Closure Plan.

1. The Bank shall be maintained in perpetuity in accordance with the terms and provisions of the long-term management plan, to be provided in the Bank Closure Plan, to be prepared by the Sponsor and submitted to the Co-Chairs within six months of the date of this BEI becoming effective. In no event, however, shall the Sponsor be permitted to close the Bank under Section V.1 of this BEI prior to the submission to, and approval by, the Co-Chairs of the Bank Closure Plan.

2. CDFG shall maintain the Bank in accordance with the long-term management component of the Bank Closure Plan, unless and until this responsibility is assigned to another entity acceptable to the Co-Chairs. CDFG may perform its obligations directly or may contract with third parties to perform such maintenance.

3. Interest from the nonwasting Endowment Fund, held by CDFG, shall be available to implement the long-term management component of the Bank Closure Plan.

H. Bank Closure: The Bank shall be deemed open on the date that the BEI is fully executed. The Bank shall be deemed closed upon:

1. Mature wetland and riparian habitats have been established consistent with the performance objectives in the Proposal; and

2. Either:

- (a) The last authorized Bank credit has been transferred; or

- (b) The Sponsor sends the Co-Chairs written notice stating that Sponsor is closing the Bank.

At this point, the project shall be deemed complete.

I. Termination of Agreement Prior to Credit Sales: The Sponsor may withdraw the entire Bank Site and terminate this BEI at any time provided that:

1. No mitigation credits developed in the Bank have been transferred in order to compensate for the loss of aquatic or riparian habitat, or endangered species impacts; and

2. The wetland acreage and habitat values of any wetland habitat existing on the Bank site prior to the initiation of efforts to restore and enhance the site shall be preserved in a condition at least equal to that prior to initiation of Bank establishment efforts;

J. Transfer: The Sponsor may, at any time, designate a replacement Bank Operator who shall agree to assume Sponsor's obligations under this BEI. The replacement Bank Operator shall be subject to the approval of the Co-Chairs; provided, however, that if the Co-Chairs have not given Sponsor written notice of disapproval of the replacement Bank Operator within 45 days of the Co-Chairs' receipt of Sponsor's written notice of designation, such replacement shall be deemed to be approved. Prior to transfer, the Sponsor shall notify the Co-Chairs, and provide a signed commitment from the replacement Bank Operator that it accepts the responsibilities of the BEI.

K. Default. If Sponsor is in default under this BEI, and fails, within 180 days of Sponsor's receipt of written notice from any one or more of the Co-Chairs that Sponsor is in default of its obligations under the BEI, to designate a replacement Bank Operator, this BEI will be terminated. So long as the designated replacement operator is able to demonstrate an ability to satisfy the obligations created by the BEI, this BEI shall not terminate, and the replacement operator shall become solely responsible for Sponsor's obligations under this BEI. If the Sponsor does not designate a replacement operator within 180 days of receipt of the notice described above, then Sponsor shall allow such public or private land or resource management organization acceptable to and as directed by the Co-Chairs to enter onto the Bank property, in order to fulfill the purposes of the Bank, as described in the BEI.

## **Section VII: Responsibilities of the MBRT**

A. MBRT Oversight: The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this banking instrument.

B. MBRT Review, Consensus: The Co-Chairs agree to consult with the agencies represented on the MBRT when appropriate. The agencies represented on the MBRT agree to review, provide comments on and strive to reach consensus (as provided in the "Federal Guidance for the Establishment, Use, Operation of Mitigation Banks") on all project plans, monitoring reports, remediation plans, and necessary permits for the Bank, as identified or incorporated by reference into the BEI, in a timely manner. Comments on the annual reports and remediation plans will be reviewed within 60 calendar days from the date of complete submittal, except for good cause. If the MBRT is unable to review remediation plans within the time specified, this fact will be reflected in any schedule established for remediation under Section VI.E and any evaluation of Sponsor for time of performance.

C. Evaluation of Bank Progress: The agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to certifying credits in the Bank, within the same timelines provided in subsection B.

D. Compliance Inspections: The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined by the Co-Chairs in coordination with the Sponsor:

1. To verify the credits then currently available in the Bank; and/or
2. Recommend corrective measures as needed.

These inspections shall continue until the effort to restore and enhance the Bank site, as described in the Proposal, has been determined to be completely successful.

## **Section VIII: Other Provisions**

### **A. Force Majeure:**

1. The Sponsor shall be responsible to maintain and remediate those phases and/or subphases of the Bank where work has been performed and credits sold, except upon Catastrophic Events, events of Force Majeure or Unlawful Acts as defined below.

2. Definitions.

- a. Catastrophic Event shall mean an event, such as a spill of hazardous or toxic substance, the impact of a vehicle or falling aircraft, or a fire, which has a material and detrimental impact on the quality of native vegetation, soils, or wildlife of the mitigation bank and over which the Property Owner (CDFG) and Sponsor have no control.

- b. Force Majeure shall mean war, insurrection, riot or other civil disorders, flood, earthquake, fire, governmental restriction or the failure by authority, or any injunction, which has a material and detrimental impact on the Bank; provided, however, that (i) a riot or other civil disorder shall constitute an event of Force Majeure only if the event has a material and detrimental impact on the quality of native vegetation, soils, or wildlife in the Bank; (ii) a flood shall be considered an event of Force Majeure only if it is greater than a presently projected 100-year flood, where "flood" refers to a runoff event; (iii) an earthquake shall constitute an event of Force Majeure only if the ground motion it generates at the Bank results in a material and detrimental impact on the quality of native vegetation, soils, or wildlife in the Bank; (iv) disease shall constitute an event of Force Majeure only if such event has a material and detrimental impact on the quality of native vegetation, soils, or wildlife in the Bank; and (v) governmental restriction or the failure by any governmental agency to issue any requisite permit or authority, or any injunction or other enforceable order of any court of competent jurisdiction shall not constitute an event of Force Majeure only to the extent that it precludes all other feasible means of remediation.

- c. Unlawful Act shall mean the unlawful act of another and shall include an event or series of events, such as the intentional dumping within the Bank or tributaries of the creek of a hazardous toxic substance, or the discharge of such a substance by any person or entity other than Property Owner (CDFG) or the Sponsor in violation of a statute, ordinance, regulation or permit, which event or series of events has a material and detrimental impact on the water quality, native vegetation, soils or wildlife of the Bank.

3. Notwithstanding the foregoing, subject to availability of funds as specified in Section VI.H, Sponsor shall not be relieved from the obligation to maintain and remediate the Bank by reason of any such discharge which occurs as a result of normal noncatastrophic activities. In case of occurrence of a Catastrophic Event, events of Force Majeure, or Unlawful Acts, Sponsor, CDFG and the Co-Chairs shall meet to discuss the future course of action and management of the Bank (areas where credits have been withdrawn) and shall continue their obligation to the extent practicable using the remaining funds in the account.

4. The Sponsor shall bear the burden of demonstrating:

(a) That the Catastrophic Event, event of Force Majeure or Unlawful Act was caused by circumstances beyond the control of the Sponsor and/or any entity controlled by the Sponsor, including its contractors and consultants;

(b) That neither the Sponsor nor any entity controlled by the Sponsor, including its contractors and consultants, could have reasonably foreseen and prevented such Catastrophic Event, event of Force Majeure or Unlawful Act; and

(c) The period during which the Sponsor was prevented by the Catastrophic Event, event of Force Majeure or Unlawful Act from carrying out its obligations to maintain and remediate the phases of the Project was no longer than the period required to address such Catastrophic Event, event of Force Majeure or Unlawful Act.

5. Reasonably foreseeable technical problems, or unanticipated or increased costs or expenses associated with the implementation of actions called for by this BEI, or changed financial or business circumstances in and of themselves shall not serve as the basis for modifications of this BEI or extensions for the performance of the requirements of this BEI.

6. Compliance with any requirement of this BEI by itself shall not constitute compliance with any other requirement. An extension of one compliance date based on a particular incident shall not necessarily result in the extension of a subsequent compliance date or dates. The Sponsor must make an individual showing of proof regarding the cause of each delayed step or requirement for which an extension is sought.

B. Dispute Resolution:

1. Between Members of the MBRT: Resolution of disputes about application of this banking instrument as between the members of the MBRT shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605 *et seq.*).

2. Between the MBRT (Acting Through the Co-Chairs) and Sponsor: In the event of any disagreement or dispute between one or more of

the Co-Chairs, acting on behalf of the MBRT, and the Sponsor regarding the interpretation and application of the provisions of this BEI, the appropriate Co-Chair(s) and the Sponsor shall meet within 30 days of a written request therefor made by a party, and shall attempt to resolve such disagreement or dispute. In the event that the Co-Chair(s) and Sponsor have not resolved the disagreement or dispute within 60 days of the date of the notice first requesting a meeting, then either party may elect to resolve the dispute or disagreement by the appropriate remedies then available under federal law.

C. Execution, Validity, Modification and Termination of the Banking Instrument:

1. The Sponsor must sign the BEI, prior to the signature and execution of the BEI by the Co-Chairs and other members of the MBRT. Subsequently, the BEI may be executed in part by each agency that chooses to become signatory to said document. The BEI will become valid and enforceable as between each signatory agency and the Sponsor on the date of that agency's signature.

2. This banking instrument may be amended or modified only upon the written approval of all of the Co-Chairs and the Sponsor, in consultation with the other members of the MBRT.

3. Termination.

(a) As regards individual signatories to the BEI, termination of the BEI may only happen consistent with the following terms:

(i) Any of the MBRT members, with the exception of the Co-Chairs, may terminate their participation upon 30 calendar days' written notification to all signatory parties.

(ii) Co-Chairs of the MBRT may only terminate their participation on the MBRT upon failure of the Sponsor to perform per the terms of the BEI. Such termination shall occur only after written notice of deficiency and opportunity to correct by the Sponsor, under the terms of the BEI, have failed to produce necessary corrective action on the part of the Sponsor. Subject to the above, any one or more of the Co-Chairs may terminate their participation upon 60 calendar days' written notification to all signatory parties.

(iii) If requested, the member(s) of the MBRT proposing to terminate participation in the MBRT agree to meet with the other MBRT members to discuss the reason(s) for such termination, prior to the termination taking effect. Notice of a request for such meeting shall be made by the requesting MBRT member(s) not later than 15 calendar days from receipt of the notice of termination.

(b) Termination by one member of the MBRT of its involvement in this BEI shall not terminate or affect the relationship between the remaining members of the MBRT, toward each other or the Sponsor, under this BEI.

(c) As regards the termination of the BEI in its entirety, the terms and provisions of this BEI will be valid:

(i) For two years from the last date of execution of the BEI by any one or more of the Co-Chairs in the event that no credits are sold from the bank; or

(ii) Until the Bank Closure Plan has been implemented to the satisfaction of the Co-Chairs, in consultation with the other members of the MBRT, and the Co-Chairs provide notice, in writing, to the Sponsor that this instrument may be terminated.

D. Specific Language of Bank Enabling Instrument Shall be Controlling: To the extent that specific language in this document changes, modifies or deletes terms and conditions contained in those documents that are incorporated into the BEI by reference, the specific language within the BEI shall be controlling.

E. Entire Agreement: This BEI, and all exhibits, addenda, schedules and agreements referred to in this BEI, in addition to any other elements of a BEI required under the Federal Guidelines not heretofore provided by the Sponsor, constitute the final, complete and exclusive statement of the terms of the agreement between the Co-Chairs of the MBRT and the Sponsor pertaining to the Bank and supersedes all prior and contemporaneous understandings or agreements of the parties. Each party acknowledges that no representation, inducement, promise or agreement, oral or otherwise, has been made by any other party or anyone acting on behalf of any party unless the same has been embodied herein.

F. Reasonableness and Good Faith: Except as specifically limited elsewhere in this BEI, whenever this BEI requires Sponsor or the MBRT to give its consent or approval to any action on the part of the other, such consent or approval shall not be unreasonably withheld or delayed. If either the Sponsor, or either one of the Co-Chairs of the MBRT disagrees with any determination covered by this provision and reasonably requests the reasons for that determination, the determining party shall furnish its reason in writing and in reasonable detail within 15 business days following the request.

G. Partial Invalidity: If a court of competent jurisdiction holds any clause of this BEI to be invalid or unenforceable, in whole or in part, for any reason, the validity and enforceability of the remaining clauses, or portions of them, shall not be affected unless an essential purpose of this BEI would be defeated by loss of the invalid or unenforceable provision.



H. Notices: All notices (including requests, demands, approvals or other communications) under this BEI shall be in writing. Notices by the Sponsor to the MBRT shall be made to all of the Co-Chairs of the MBRT. Such notice shall not be effective until deemed received by all Co-Chairs of the MBRT.

Addresses for purposes of giving notice are set forth below. Either party may change its address or telex or fax number by giving the other party notice of the change in any manner permitted by this section.

**MBRT Co-Chairs:**

**USACE:**

U.S. Army Corps of Engineer  
Los Angeles District  
Attn: Chief, Regulatory Branch  
911 Wilshire Boulevard  
P. O. Box 532711  
Los Angeles, CA 90017-3401  
Telephone: (213) 452-3406  
Fax: (213) 452-4196

**CDFG:**

California Department of Fish and Game  
South Coast Region  
Attn: Regional Manager  
4949 Viewridge Avenue  
San Diego, CA 92123  
Telephone: (619) 467-4201  
Fax: (858) 467-4235

Legal Office  
California Department of Fish and Game  
1416 9<sup>th</sup> Street, 12<sup>th</sup> Floor  
Sacramento, CA 95814  
Telephone: (916) 654-3821  
Fax: (916) 654-3805

**MBRT Members:**

U.S. Fish and Wildlife Service  
Carlsbad Field Office  
Attn: Chief, Ecological Services  
2730 Loker Avenue West  
Carlsbad, CA 92008  
Telephone: (760) 431-9440  
Fax: (760) 431-9624

U.S. Environmental Protection Agency  
Region IX  
Attn: EPA Water Director  
75 Hawthorne Street  
San Francisco, CA 94105  
Telephone: (415) 744-1001  
Fax: (415) 744-1078

Sponsor:

Wildlands, Inc.  
5910 Auburn Boulevard, Suite 17  
Citrus Heights, CA 95621  
Telephone: (916) 331-8810  
Fax: (916) 331-8755

L. Restriction on Benefit. No member of or delegate to the United States Congress or Federal Resident Commissioner shall be entitled to any share or part of this Agreement, or to any benefit that may arise from it.

M. Counterparts. This Agreement may be executed in any number of duplicate and counterpart originals. A complete original of this Agreement containing original signatures of each of the parties shall be circulated to each of the parties by Sponsor and a complete original of this Agreement shall be maintained in the official records of each of the parties hereto.

N. No Third Party Beneficiaries. This Agreement shall not create any third party beneficiary hereto, nor shall it authorize anyone not a party hereto to maintain a suit for personal injuries, property damages or enforcement pursuant to the provisions of this Agreement. The duties, obligations and responsibilities of the parties to this Agreement with respect to third parties shall remain as otherwise provided by law in the event this Agreement had never been executed.

**Section IX: Execution**

This BEI shall become effective on the date of the signature by the last agency to sign this BEI, and shall be binding only upon Sponsor and the agencies so signing.